

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

The Berkshire Gas Company

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D.T.E. 01-56

**THE ATTORNEY GENERAL’S MOTION TO STRIKE SECTIONS OF BERKSHIRE’S
REPLY BRIEF**

I. INTRODUCTION

Pursuant to 220 C.M.R. §§ 1.10 (1) and 1.11(8) the Attorney General moves to strike extra-record evidence and statements in the Reply Brief of the Berkshire Gas Company (“Berkshire” or “Company”). In its Reply Brief Berkshire discusses both settlement negotiations with the Attorney General and legal invoices that were not part of the record in this case. The Attorney General promptly requested that the Company voluntarily revise its brief to conform with the record evidence, but Berkshire refused. *See* attachment A and B.

Without record support of any type Berkshire also proposes in the Reply Brief a ten year limit to the period during which it intends to recover the acquisition premium. The Company attempts to enter new evidence into the record by attaching to its Reply Brief revisions to cost of service schedules that go far beyond the routine updates expected in rate cases. The Attorney General now moves to strike the references to: 1) settlement negotiations, 2) the existence of additional legal invoices; 3) references to the ten year limit on acquisition premium recovery, 4) revised medical insurance expense payments; and, 5) the \$300,000 increase in base rates over the originally noticed \$4.6 million revenue deficiency.

II. STANDARD OF REVIEW

Unsworn statements shall not be considered as evidence. 220 C.M.R. § 1.10 (1). The Department's rules provide that "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." 220 C.M.R. § 1.11(8). To cite, reference or otherwise rely upon extra-record evidence and statements violates the Attorney General's due process rights and the Department's rules and precedent. *MediaOne/New England Telephone*, D.T.E. 99-42/43, pp. 17-18 (1999); *Boston Edison Company*, D.P.U. 90-335, pp. 7-8 (1992); *Payphone Inc.*, D.P.U. 90-171, pp. 4-5 (1991); *see also* G.L. c. 30A, § 11; 220 C.M.R. §§ 1.11(4), 1.11(7) and 1.11(8). When faced with a reference to extra-record evidence, Department precedent establishes that the proper procedure is to "strike extra-record evidence from a brief and require the offending party to file a conforming brief without reference to the excluded evidence." *Boston Edison Company v. Brookline Realty & Inv. Corp.*, 10 Mass.App.Ct. 63, 69 (1980). The Department has also used an alternative approach to "[strike] the offending portions from the brief and [] disregard those portions of the brief in reaching a decision in the case." *AT&T Communications*, D.P.U. 91-79, p. 8 (1992), *citing* *Service Publications Inc. v. Gorman*, 396 Mass. 567, 580 (1986); *Hull Municipal Light Plant*, D.P.U. 87-19-A, p. 7 (1990); *Boston Edison Company*, D.P.U. 90-335, pp. 7-9 (1992).

Only in limited circumstances has the Department found good cause to permit the submission of evidentiary documents into the record following the close of evidentiary hearings. *Payphone Inc.*, D.P.U. 90-171, pp. 4-5 (1991) (fundamentally unfair to admit evidence not subject to cross

examination). The Department's case law on late-filed exhibits is based upon the premise that the material is prejudicial because other parties do not have the opportunity to conduct cross-examination regarding the new evidence in order to test the accuracy of the data through the litigation process. *New England Telephone and Telegraph Company*, d/b/a/ NYNEX, D.P.U. 94-50, p. 62 (1995).

III. ARGUMENT

1. Berkshire's Discussion Of Settlement Negotiations With The Attorney General Has No Record Support.

Although the record in this case contains no evidence of settlement negotiations, Berkshire references these negotiations in its Reply Brief. Co. Reply Br., p. 53, n. 45. There is no specific record citation for the statement that the Company engaged in "good faith" negotiations because no record evidence exists supporting this claim. Berkshire's statement amounts to an unsworn statement or reference to extra-record evidence and should be stricken. 220 C.M.R. §§ 1.10 (1) and 1.11(8). Had the hearings addressed the settlement negotiations, the Attorney General certainly would have explored in great detail whether the Company engaged in a good faith attempt to resolve the controversial issues in this case.

2. Berkshire Alludes To Detailed Legal Invoices That Are Not Part Of The Record In This Case.

Berkshire makes another reference to non-record evidence on brief: "Counsel further maintains detailed [legal] billing back-up in six minute increments in the event that further detail is requested by the Company." Co. Reply Br., pp. 52-53. No citation supports this statement, nor could one. During the

proceedings, the Company declined to produce these alleged “detailed” legal invoices after repeated discovery and record requests by both the Department and the Attorney General. *See* attachment B, Exh. DTE 4-11, AG 5-28, AG 3-9, AG RR-38, AG RR-38 (supplemental response stipulation *in lieu* of motion to compel production of documents per rules requiring parties voluntarily to settle discovery disputes prior to seeking a Department ruling), AG RR-39. The Attorney General also cross examined the Company’s witness extensively on the lack of description regarding legal expenses, as well as the missing pages from the produced invoices. Tr. 14, pp. 1532-1537, AG RR-38, AG RR-38 (supplemental response). At no time did the Company state on the record it had control over another set of legal invoices that supposedly contain further explanations of the actual services provided.¹ The Company stonewalled the Attorney General’s attempts at discovery and cross-examination, and may not now attempt to bolster its case by suggesting the existence of the very documents and information the Attorney General actively sought, but was refused, during the hearings.² Such references in the brief amount to unsworn statements or reference to extra-record evidence and should be stricken. 220 C.M.R. §§ 1.10 (1) and 1.11(8).

¹ According to the Ground Rules issued by the Hearing Officer: “Information requests are . . . in the nature of . . . requests for documents (Mass. R. Civ. P. 34).” Procedural Order, §1, August 23, 2001. Under Rule 34, a party must produce all requested documents in its “possession, custody or control.” Mass. R. Civ. P. 34(a).

² The Department has recently issued an order reaffirming the obligation of a party to present evidence in the possession of outside consultants during hearings. *Interlocutory Order*, DTE 01-20, pp. 30-38 (October 18, 2001) (a party presenting evidence may not fail to produce supporting information or resist cross examination by claiming that a third party consultant possesses the information sought). In this case Berkshire may not simply remain mute on the topic of detailed legal invoices during the proceedings and then suddenly claim that its third party legal consultant, Rich May, had the relevant documents and information all along.

The Company has continued its inappropriate conduct with its January 7, 2002, supplemental response to AG 3-9 regarding updated rate case expense, including over \$300,000 in requested legal fees for the five-month period ending December 2001. The Company again refused to produce the “detailed billings” it claimed Rich May maintains for Berkshire’s reference, and instead continued to file the summary invoices with descriptions reading, in full, as follows: “Legal services for the period ending November 30, 2001 with respect to: 2001 Rate Case \$98,073.00.” AG 3-9 (supplemental response).

3. The Record Contains No Support For The Company’s Proposed Ten Year Limit To The Period Of Acquisition Related Cost Recovery.

As with the settlement negotiations and the alleged detailed legal invoices, the Company makes another reference to non-record evidence by proposing for the first time in the Reply Brief a ten year limit for merger cost and acquisition premium recovery. Co. Reply Br., p. 24, first bullet. This express limit appears for the very first time only in the Company’s Reply Brief. The Attorney General cross examined the Company’s witnesses on the treatment of the acquisition premium and merger cost recovery, but Berkshire refused to commit under oath to exactly how it intended treat these costs after the ten year term of the Price Cap Mechanism. E.g., Tr 4, pp. 512-513. Berkshire’s position now just introduced in its Reply Brief constitutes an unsworn statement or reference to extra-record evidence and should be stricken. 220 C.M.R. §§ 1.10 (1) and 1.11(8).

4. The Company’s Revised Medical Expense Insurance Payments Are Not A Routine Cost Of Service Schedule Update.

Department practice allows utilities to supplement the record after the conclusion of hearings with routine cost of service updates. *See Blackstone Gas Company*, D.T.E. 01-50 (2001). Berkshire's "Schedule JJK-32 Revised" attached to the Reply Brief goes far beyond the normally permitted revisions to medical expense insurance payments. As a result the Department should disregard this cost of service update.

If the Department deems the adjustment appropriate, then, in the interests of fairness the Attorney General should be granted an opportunity to conduct limited discovery on the revisions. In an attempt to reconcile the obvious inconsistencies with other information already in the record, the Attorney General seeks leave to issue the following record requests:

- 1) Please provide a complete and detailed description of the reasons for the 40 percent increase in medical insurance payment costs over the budgeted amount of the period reported in the late filed "Schedule JJK-32 Revised." Please also provide copies of all studies, analyses, reports and any correspondence regarding the variance in the actual amount from the budgeted amount for any period of 2001.
- 2) Please provide copies of all of the invoices from Blue Cross Blue Shield associated with the 2001 costs indicated in the late filed "Schedule JJK-32 Revised."
- 3) Please provide copies of all correspondence with Blue Cross Blue Shield regarding the Company's 2001 costs indicated in the late filed "Schedule JJK-32 Revised."
- 4) Please provide a complete and detailed description of the reasons that the "Medical – Employee Contribution" as shown in the period reported in the late filed "Schedule JJK-32 Revised." does not equal 5 percent of the Medical Insurance Payments as Mr. Kruszyna testified to on page 25 of his prefiled testimony in this case.
- 5) Please provide the numbers of employees by employee group (e.g. union, clerical, administrative) by month for each of the months of 2001 as available.
- 6) Please indicate how the Company adjusted the 2001 expense amount for the apparent 6.6 percent decrease in the number of union employees as indicated on Exhibit AG-1-44 for July of 2001.

These requests are narrowly focused to address the issues raised by the Company's late filed exhibit, and should be allowed as an alternative form of relief.

5. The Revised Base Rate Calculations Exceed by \$300,000 The Amount Originally Noticed By Berkshire And Should Be Disregarded.

When a utility files a petition for a general rate increase under G. L. c. 164, § 94, Department rules require that the company publish the amount of the alleged revenue deficiency. 220 C.M.R. § 5.06. Berkshire originally requested a \$4.6 million rate increase. Notice of Inquiry, July 19, 2001. The Company's new adjustments and revisions attached to the Reply Brief increase the amount of the proposed revenue deficiency to \$4.9 million. Schedule JJK-1 (super-revised). This new figure represents a substantial increase over the amount originally filed and due process concerns require that the public be afforded notice and an opportunity to be heard on the additional \$300,000 in revenue deficiency. According to Department precedent, the amount of the proposed rate increase should be limited to the figure published in the public notice. *Milford Water Company*, D.P.U. 92-101, p. 1 n.1 (1992).

WHEREFORE for these reasons the Attorney General requests:

1. That the Department strike and disregard all portions of the Company's Reply Brief that refer to settlement negotiations with the Attorney General.
2. That the Department strike and disregard all portions of the Company's Reply Brief that refer to legal invoices that were not already produced prior to the close of hearings.

3. That the Department strike and disregard all portions of the Company's Reply Brief that suggest the Company proposed a ten year limit to the period of merger related cost recovery.
4. That the Department strike and disregard all lines of Schedule JJK-32 Revised that reflect increases to the Company's medical expense insurance payments. As an alternative form of relief, the Attorney General requests that the questions listed in section III (4) above be deemed record requests to be answered by Berkshire within ten (5) days of this motion.
5. That the Department order the Company to publish a new public notice regarding the \$300,000 base rate increase in Schedule JJK-1 (super-revised) and suspend this increase for six months.
6. That the Department grant such other relief it finds just and proper.

Respectfully submitted,

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Dated: